

STATE OF MICHIGAN  
BEFORE THE MICHIGAN JUDICIAL TENURE COMMISSION

COMPLAINT AGAINST:

Formal Complaint No. 86

Referee David G. Myers  
Sanilac County Friend of the Court  
60 W. Sanilac Road  
P.O. Box 187  
Sandusky, Mi 48471

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Paul J. Fischer ( P35454 )  
Executive Director / General Counsel  
Michigan Judicial Tenure Commission  
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David G. Myers (P30057)  
Respondent Referee  
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RESPONDENT'S BREIF ON THE ISSUE OF SANCTION

I. Statement of Facts.

Respondent David G. Myers ( DOB 5/3/52 – Age 58 ) has been a licensed attorney in the State of Michigan since being admitted to the State Bar of Michigan in June of 1979 (P30057). Attorney Myers has no formal record of prior discipline and no prior criminal record. Respondent Referee Myers is currently employed for Sanilac County, Michigan in the dual capacity of Friend of the Court and Family Court Referee and has been employed in that capacity since appointment to his current position by 24<sup>th</sup> Judicial Circuit Court Chief Circuit Court Judge Donald A. Teeple (P24452) on November 1<sup>st</sup>, 1999.

On or about Wednesday September 23<sup>rd</sup>, 2009, after regular working hours, Respondent Attorney Myers was arrested for misdemeanor drunk driving offense in the Village of Caro, County of Tuscola, in the State of Michigan. Respondent subsequently entered a guilty plea to the criminal misdemeanor offense of Operating While Intoxicated before ( Visiting ) District Court Judge John T. Connolly (P12140) in Tuscola County District Court Case No. 2009-1198-SD on January 29<sup>th</sup>, 2010. Attorney Myers was sentenced by the District Court on January 29<sup>th</sup>, 2010 to pay fines and costs of \$500.00, attend victim impact panel, perform 4 hours of community service, attend Alcoholics Anonymous Meetings twice a week for 3 months and to be placed on probation for three ( 3 ) months. Additionally, Respondent Attorney was sanctioned by the Michigan Secretary of State Office to have his driving privilege suspended for six ( 6 ) months ( with no restricted driving privileges for the first thirty ( 30 ) days ) and pay \$2000.00 in fines and \$125.00 in driver's license restoration fees.

Respondent Attorney Myers has successfully completed all of the terms of his District Court sentence and received Order of Discharge from Probation from the District Court on April 29<sup>th</sup>, 2010 ( See Order of Discharge, April 29<sup>th</sup>, 2010 ), has complied with all of the terms of driver's license sanction imposed by the Michigan Secretary of State and received restoration of unrestricted driving privileges in the State of Michigan on Tuesday August 17<sup>th</sup>, 2010, and has refrained from the use of alcohol since September 23<sup>rd</sup>, 2009, and continuously attended Alcoholics Anonymous meetings twice a week from January 1<sup>st</sup>, 2010 through the present date ( See Record of AA/NA attendance ).

On or about June 15<sup>th</sup>, 2010, Formal Complaint No. 86 was filed against Referee David G. Myers , Sanilac County Friend of the Court, by the Michigan Judicial Tenure Commission pursuant to the authority of the Commission under Article 6, Section 30 of the Michigan Constitution of 1963, as amended, and MCR 9.200 et. seq. alleging that Respondent's conduct on September 23<sup>rd</sup>, 2009 and conviction of Operating While Intoxicated on January 29<sup>th</sup>, 2010 amounted to misconduct in office in violation of the Michigan Constitution of 1963 and Michigan Court Rule 9.205, in violation of the Michigan Code of Judicial Conduct, and in violation of Michigan Court Rule 9.104 (A) (2).

On or about June 24<sup>th</sup>, 2010, Respondent Attorney David G. Myers filed Answer to Formal Complaint No. 86 of the Michigan Judicial Tenure Commission essentially admitting the conduct / misconduct complained of and admitting that the conduct and misdemeanor conviction complained of amounted to a violation of a criminal law of the State of Michigan contrary to Michigan Court Rule 9.104 (A) (5) and Canon 2A and 2B of the Michigan Code of Judicial Conduct. On July 16<sup>th</sup>, 2010, Judicial Tenure Commission Chairperson Hon. Kathleen J. McCann (P29828) entered Order Setting Hearing Date Before Commission which provided that the parties may present closing argument regarding the facts and recommendation as to possible sanction in this matter before the commission on September 13<sup>th</sup>, 2010 at 10 A.M. at a courtroom of the Michigan Court of Appeals in Detroit, Michigan and that each party shall file a brief, not to exceed 25 pages, on the issue of sanction on or before August 20<sup>th</sup>, 2010.

## II. ISSUE.

The issue before the Michigan Judicial Tenure Commission in this case is the nature and extent of the sanction to be imposed upon Referee Myers.

### III. ARGUMENT.

A. Respondent Referee Myers argues that no discipline other than public censure should be imposed for the reason that the misconduct complained of did not occur during the course of employment, does not involve performance of judicial duties, and is not clearly prejudicial to the administration of justice.

B. Respondent Referee Myers argues that discipline imposed should not include suspension of referee duties without pay for the reason that the conduct complained of did not occur in the course of performance of referee duties, does not impact upon the performance of referee duties, and suspension of referee duties without pay will not serve to protect the public or preserve the integrity of the judicial system.

C. Respondent Referee Myers argues that discipline imposed should be tempered in consideration of Respondent Referee's successful completion of District Court Sentence, successful completion of driver's license sanctions imposed by the Michigan Secretary of State, and continued refrain from the use of alcohol and twice weekly attendance at Alcoholics Anonymous meetings.

#### IV. LAW.

The Michigan Judicial Tenure Commission was created to promote the integrity of the judicial process and preserve public confidence in the courts when voters passed an amendment to Article 6, )( 30 of the Michigan Constitution in August, 1968. The enabling court rule is now codified in Michigan Court Rules 9.200. The Michigan Judicial Tenure Commission strives to hold state judges, magistrates, and referees accountable for their misconduct without jeopardizing or compromising the essential independence of the judiciary. The basis for commission action is a violation of the Code of Judicial Conduct or Rules of Professional Conduct, which are published with the Michigan Rules of Court. Article 6, )( 30 (2) of the Michigan Constitution authorizes the Michigan Supreme Court to “censure, suspend with or without salary, retire, or remove a judge from office, upon the recommendation of the Michigan Judicial Tenure Commission.”

The Michigan Supreme Court has determined that a drunk driving conviction constitutes “misconduct” under Michigan Court Rule 9.104(5), regardless of whether the conviction, on its face, reflects adversely on the attorney’s honesty, trustworthiness, or fitness as a lawyer under MRPC 8.4(b). Grievance Administrator v. Deutch, 455 Mich 149; 565 NW 2<sup>nd</sup> 369 (1997 ). Similarly, the Michigan Supreme Court has determined that a drunk driving conviction by a judge results in a breach of the standards of judicial conduct by (a) Failure to establish, maintain, enforce and personally observe high standards of conduct so that the integrity and independence of the judiciary may be preserved, in violation of Canon 1 of the Michigan Code of Judicial Conduct ( “MCJC”); (b) Irresponsible or improper conduct which erodes public confidence in the judiciary, in violation of MJCJ, Canon 2A; (c) Conduct involving the appearance of impropriety, in violation of MJCJ, Canon 2A; (d) Failure to conduct oneself at all times in a manner which would enhance the public’s confidence in the integrity of the judiciary, contrary to MJCJ, Canon 2B; and (e) conduct which exposes the legal profession or the courts to obloquy, contempt, censure, or reproach in violation of MCR 9.104(A)(2). ( See In Re: HON. CHARLES C. NEBEL, Michigan Supreme Court Order of January 27, 2010, SC: 140201, RFI No. 2009-18331. )

However, the Michigan Supreme Court has also determined that not all criminal conduct shall result in discipline. Deutch, 455 Mich 166, 167, 171, 173, and 174. “Although a lawyer is personally answerable to the entire criminal law, a lawyer should be professionally answerable only for offenses that indicate lack of those characteristics relevant to law practice.” Grievance Administrator v. Fink, 462 Mich 198; 612 NW2nd 397 ( 2000) ( quoting Standard 5.12 of the American Bar Association’s Standards for Imposing Lawyer Sanctions ). See also Michigan Rules of Professional Conduct section 8.4, comment. Respondent Referee argues that the referee guilty of criminal misconduct in this case should likewise be professionally answerable only for offenses that indicate a lack of characteristics relevant to the conduct of referee matters.

Prosecution of Respondent Referee by filing of Formal Complaint herein pursuant to MCR 9.209 without first offering Respondent Attorney the opportunity to avoid formal prosecution by successfully completing some form of contractual probation pursuant to MCR 9.114(B) and/or some form of monitoring with conditions imposed by the Judicial Tenure Commission pursuant to MCR 9.207(B) denies Respondent Attorney David G. Myers Equal Protection of the Law.

The Fourteenth Amendment to the U.S. Constitution, among other things, protects individuals against any state action that would “Deny to any person within its jurisdiction the equal protection of the laws. “ This means that similarly situated persons should be treated similarly under the law.

The Michigan Attorney Grievance Commission resolves most attorney convictions of impaired driving and/or intoxicated driving without public disciplinary action, such as by contractual probation, admonitions, closings, or dismissals. ( Impaired Driving Convictions and the Disciplinary Process, By Cynthia Bullington, Michigan Bar Journal, December 2009). In cases involving attorney convictions of first offense impaired driving not resolved without public disciplinary action by admonition, closing, or dismissal; the Michigan Attorney Grievance will offer the responding attorney the opportunity to avoid formal prosecution by successfully completing some form of contractual probation pursuant to MCR 9.114(B).

The Michigan Judicial Tenure Commission (through its Executive Director) has advised Respondent Attorney that contractual probation and/or monitoring with conditions are not available as an alternative to prosecution by formal complaint in regard to these proceedings. When any Michigan attorney convicted of a first offense impaired driving or intoxicated driving offense would be offered the opportunity to avoid formal disciplinary action by successful completion of contractual probation and/or monitoring but for the fact that the attorney involved is also a referee, similarly situated persons are not being treated similarly.

Michigan Court Rule 9.205(B)(3) provides that, “ In deciding whether action with regard to a judge is warranted, the commission shall consider all the circumstances, including the age of the allegations and the possibility of unfair prejudice to the judge because of the staleness of the allegations or unreasonable delay in pursuing the matter.”

The allegations of intoxicated driving in this matter refer to an offense that occurred nearly a year ago ( on September 23<sup>rd</sup>, 2009 ) and, since the commission of the offense referred to; Respondent Referee has paid Court Costs and Fines totaling over \$500.00, Attorney Fees totaling over \$3000.00, Secretary of State Fees and penalties totaling over \$2000.00, and successfully completed all of the terms of his District Court Probation for the offense complained of as well as all of the requirements of the Michigan Secretary of State to obtain full restoration of his driving privileges in the State of Michigan. Since Respondent Referee has continued to conduct referee hearings in Sanilac County, Michigan for the past year and currently has referee hearings scheduled through September of 2010 and has paid the fees required to renew his Michigan Court Reporting/Recording Certificate ( CEO #7937 ) required for performance of Referee duties for the next year; Respondent Referee has been prejudiced by the delay in pursuing this matter and would be unfairly prejudiced by again being punished and/or “rehabilitated” at this date for the conduct complained of.



The Michigan Supreme Court has held, in the matter of In Re Brown, 461 Mich 1291, 1292-1293 ( 2000):

Everything else being equal:

- (1) misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;
- (2) misconduct on the bench is usually more serious than the same misconduct off the bench;
- (3) misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance of propriety;
- (4) misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;
- (5) misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;
- (6) misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery;
- (7) misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion are more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

The misconduct of Respondent Referee in the matter at hand is not part of a pattern or practice and does involve an isolated instance of misconduct, did not take place on the referee bench, was not prejudicial to the actual administration of justice, did not implicate the actual administration of justice or its appearance of impropriety, was not premeditated or deliberated, did not undermine the ability of the justice system to discover the truth of what occurred in a legal controversy or to reach the most just result in such a case, and did not involve the unequal application of justice. Respondent attorney in this case argues that no discipline greater than public censure should be imposed in this case for the reason that the conduct complained of did not occur in the course of employment as a referee ( or even in the county in which respondent is employed as a referee ), the conduct complained of did not involve the performance of judicial or referee duties, and is not clearly prejudicial to the administration of justice. The referee involved in this case has no prior discipline and no prior conviction of any kind.

The Michigan Supreme Court has recently opined that, "It does not necessarily follow that an individual whose driving privileges have been curtailed or who has otherwise been subject to criminal sanctions for driving offenses must also have his or her professional privileges curtailed." Grievance Administrator v. Dianne L. Baker, State of Michigan Attorney Discipline Board Case No. 07-189-JC, Decided: January 27, 2010, ( Application for Leave to Appeal Denied by Michigan Supreme Court 6/25/10 ). Based on the nature of this offense and offender, the Michigan Judicial Tenure Commission should impose discipline/sanction that does not include suspension of referee duties without pay for the reason that the conduct complained of did not occur in the course of performance of referee duties, does not impact upon the performance of referee duties, and suspension of referee duties without pay in this case will not serve to protect the public or preserve the integrity of the judicial system.

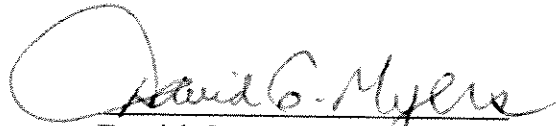
Finally, in the event that the Michigan Judicial Tenure Commission determines that discipline/sanction in this case should include a term of suspension without pay, the term of suspension without pay should be reduced/tempered by the fact that Respondent Referee has already successfully completed all of the terms of his criminal sentence for the driving while intoxicated offense involved herein, the fact that Respondent Referee has successfully completed all of the requirements of the Michigan Secretary of State to obtain full restoration of his driving privileges in the State of Michigan, as well as the fact that Respondent Referee has refrained from drinking since September 23<sup>rd</sup>, 2010 and attended Alcoholics Anonymous meetings twice weekly since January 1<sup>st</sup>, 2010, and the fact that Respondent Referee has already been publicly censured by publication of Michigan Judicial Tenure Commission Formal Complaint No. 86 on the Michigan Judicial Tenure Commission website, in the Michigan Lawyer's Weekly, and the Michigan Bar Journal.

With the consent of the respondent and the Michigan Judicial Tenure Commission, the Supreme Court may impose a sanction or take other action at any stage of the proceedings under these rules. MCR 9.220(C) For example; should the Michigan Judicial Tenure Commission decide that the discipline imposed upon a judge/referee for a conviction of driving while intoxicated in any given case should include a ninety ( 90 ) day suspension of judicial/referee duties without pay; that ninety ( 90 ) day suspension without pay in this case could be reduced by thirty ( 30 ) days for successful completion of District Court sentence and requirements for obtaining restoration of driving privileges and further reduced by another thirty ( 30 ) days for continued refrain from the use of alcohol and continued twice weekly attendance at Alcoholics Anonymous meetings for nearly a year after the drinking and driving offense took place. Then, with the consent of Respondent Referee, the Michigan Judicial Tenure Commission could recommend to the Michigan Supreme Court entry of Consent Order of Discipline providing for formal censure, thirty (30) day suspension of referee duties without pay, and successful completion of all of the terms of the District Court sentence for conviction of the intoxicated driving offense by Referee Myers.

## V. Conclusion.

Suspension of the referee duties of Respondent Referee David G. Myers without pay in this case would not serve to preserve the integrity of the judicial system, to enhance public confidence in that system, or to protect the public, the courts, and the rights of judges in the State of Michigan.

Dated: August 17<sup>th</sup>, 2010

A handwritten signature in cursive script, appearing to read "David G. Myers", written over a horizontal line.

David G. Myers ( P30057)

Respondent Referee

Referee / Sanilac County Friend of the Court